IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 40 of 1994

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Applicant(s)

Versus

CHALTAN VIBHAG UDYOG KHAND SAHAKARI MANDLI LTD - Respondent(s)

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Appearance :
MR MANISH R BHATT for MR JP SHAH for the Applicant
NOTICE SERVED for Respondent No(s).: 1.
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 24-25/08/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. Income Tax Appellate Tribunal, Ahmedabad Bench “C” has referred the following question of law under Section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax, Surat.

> “Whether, in law and on facts of the case, the I.T.A.T. was right in holding that when judgement of Honourable Supreme Court was there before passing the assessment order, and despite, Assessing Officer had made assessment without following the Supreme Court judgement and later took an action u/s 154, the action is change of opinion and is not correction of mistake apparent from record and cannot be rectified by way of an action u/s 154?”

2. The assessment year is 1975-76 and the relevant accounting period is the year ended on 30/6/1974. The assessing officer framed an assessment order on 3/8/1979 under Section 143(3) read with Section 144B of the Act. He worked out the total income at Rs.Nil. While granting deduction under Section 80P, he allowed deduction under Section 80J, development rebate and then after granting deduction under Section 80P, he deducted amount of carried forward loss of assessment year 1973-74 and set off the same to work out the total

income at Rs.Nil.

3. Subsequently, on scrutiny of records, according to the assessing officer, there was a mistake in the original assessment order. The mistake, according to him, was that deduction of carried forward loss, current development rebate and deduction under Section 80J for the current year was not according to the priorities in which the said items were deductible. He, therefore, issued a show cause notice and after considering the reply tendered by the assessee, came to the conclusion that the assessment order was required to be rectified. For this purpose, he placed reliance on decision of the Apex Court in case of Cambay Electric Supply Industrial Co. Ltd. v. Commissioner of Income Tax, Gujarat II, [1978] 113 ITR 84. In the rectification order, in the first instance, he granted deduction of current depreciation, followed by unabsorbed business loss, followed by unabsorbed depreciation and thereafter, unabsorbed development rebate. Thus, he worked out the total income at Rs.Nil and thereafter, has worked out development rebate and relief under Section 80J which are required to be carried forward. In effect, therefore, by virtue of the rectification order, relief under Section 80P which was granted in the original

assessment came to be withdrawn.

4. The assessee carried the matter in appeal before the CIT (Appeals), who vide order dated 16/3/1989, came to conclusion that the matter was of debatable nature and could not be rectified under Section 154 of the Act. The revenue carried the matter in appeal before the Tribunal, who vide its order dated 26/4/1993, confirmed the order of CIT (Appeals). It is this order which is under challenge in the present reference.

5. Mrs.M.M.Bhatt, the learned standing counsel appearing on behalf of the applicant revenue submitted that Supreme Court decision would always constitute a ground for holding that the order was suffering from an apparent mistake. That this position was settled in law and in the circumstances, the order of the Tribunal was bad in law and ought to be reversed. Mr.M.J.Shah, the learned advocate appearing on behalf of the respondent assessee relied on the order of the Tribunal and submitted that, as held by Supreme Court in the case of T.S.Balaram, Income Tax Officer v. Volkart Brothers, [1971] 82 ITR 50, true scope of a provision could never form subject matter of rectification proceedings.

6. As already noticed, the dispute between the parties is not as to whether, before granting deduction under Chapter VIA of the Act, how is the gross total income to be worked out, but the dispute is in relation to the priority to be assigned to carry forward business loss, current development rebate and deduction under Section 80J of the Act. In other words, which of these items is to be allowed at what stage. Whether the carried forward loss is required to be given precedence over the deductions available for the year under consideration or the items of unabsorbed business loss, unabsorbed depreciation and unabsorbed development rebate take precedence over deductions for the year under consideration. The issue as such is not finally resolved, though insofar as the unabsorbed depreciation is concerned, the Apex Court in case of Commissioner of Income Tax, Kanpur v. Mother India Refrigeration Industries P. Ltd., [1985] 155 ITR 711 laid down that, in computing the profits and gains of a business for the current year, depreciation for the current year must be deducted first before deducting the unabsorbed carried forward business losses of earlier years. It is further laid down that the legal fiction treating unabsorbed carried forward depreciation partake the

same character as the current depreciation cannot be extended beyond its legitimate field and will have to be confined to that purpose. The end-result is, therefore, that the order of priority amongst different items like carried forward business losses of earlier years, unabsorbed development rebate of earlier years etc., is not free from doubt. To put it differently, the position in law is not settled.

7. In these circumstances, the reliance placed by the Commissioner (Appeals) and the Tribunal on the ratio of the Apex Court decision in case of T.S.Balaram, Income Tax Officer v. Volkart Brothers (supra) is correct. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on a debatable point of law is not a mistake apparent from the record. The reliance on the Apex Court decision in case of Cambay Electric Supply Industrial Co. Ltd. v. Commissioner of Income Tax (supra) by the revenue cannot carry the case of revenue any further.

8. The Tribunal was, therefore, right in holding that the

action under Section 154 of the Act could not be sustained in absence of any mistake apparent from record and no rectification was permissible. The impugned order of Tribunal is, therefore, upheld for the aforestated reasons. Hence, the final conclusion of the Tribunal is upheld without approving some of the reasons which weighed with the Tribunal. The question is accordingly answered in the affirmative to the limited extent i.e. in favour of the assessee and against the revenue. The Reference stands disposed of accordingly. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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